January 9, 2012

With A Focus On Fraud, California Federal Court Finds Song-Beverly Act Does Not Apply to Online Transactions

By Purvi G. Patel and Megan T. Low

The California Supreme Court’s February 2011 decision in Pineda v. Williams-Sonoma Stores, Inc.1 spawned hundreds of lawsuits against brick-and-mortar retailers complaining that retailers collected customers’ “personal identification information” (PII) in violation of the Song-Beverly Credit Card Act (the “Act”). Pineda also triggered a wave of lawsuits against online businesses, raising the question of whether the Act applies to online transactions. In a case brought against Microsoft Corporation, a California federal court has recently answered that question in the negative — reasoning that Pineda supports the conclusion that online transactions are outside the scope of the Act.

On January 6, 2012, the United States District Court for the Central District of California dismissed a case against Microsoft Corporation on the grounds that the Act does not apply to online transactions.2 On the same day, the Court dismissed a similar case against Redbox Automated Retail, LLC holding that the Act does not apply to transactions involving self-service DVD kiosks.3 The Court’s analysis in both cases was similar, focusing on the statutory language and purpose of the Act.4

The Act prohibits businesses from requesting that cardholders provide PII during credit card transactions and then recording that information. Saulic v. Symantec Corporation, a pre-Pineda case out of the Central District of California, was the first case to conclude that online transactions are not covered by the Act.5 Pineda, however, created uncertainty surrounding the continued viability of Saulic.

---

1 In February 2011, the California Supreme Court concluded in Pineda v. Williams-Sonoma Stores, Inc. that a retailer who requests and records a customer’s ZIP code during a credit card transaction violates the Act. Pineda v. Williams-Sonoma Stores, Inc., 246 P.3d 612, 614 (Cal. 2011). Following Pineda, more than 200 lawsuits have been filed against retailers doing business in California. Please see here for additional background about the Song-Beverly Act and Pineda decision.


4 Although the analysis in the Microsoft and Redbox orders is similar, for purposes of this Client Alert, we reference the Microsoft order throughout.

Client Alert.

The Microsoft court’s analysis eliminates some of that uncertainty. The Court found that the plain language of the Act prohibits writing PII on the credit card form and utilizing preprinted spaces for PII; the Act makes no specific reference to online transactions. 6 This language, according to the Court, contemplates “pen and paper” transactions, rather than “electronic entry of numbers on a keypad or touchscreen” 7 and thus does not apply to online transactions.

The Court also found that the purpose of the Act supports an interpretation that the Act is limited to brick-and-mortar transactions. The Court’s analysis of the Act’s legislative history echoed the analysis in Saulic, which differentiated between the goals of the Act and the “unique fraud concerns” associated with online transactions. 8 The Saulic court noted that because “online merchants must ultimately accept payment with nothing more than a name and credit card number,” they therefore have no means other than through PII to verify the cardholder’s identity. 9 Following this reasoning, the Microsoft court recognized that “collection of personal information in an online transaction may be the only means of verifying a customer’s identity in order to prevent credit card fraud.” 10 Both the Saulic and Microsoft courts reasoned that because the Act was concerned with the use of PII for unsolicited marketing — not as a fraud prevention measure — the language of the Act cannot “reasonably be read to encompass online transactions.” 11

The Microsoft court concluded that Pineda supports dismissal (and in the process reconciled Saulic and Pineda) by turning again to the legislative history, which “demonstrates the Legislature intended to provide robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction.” 12 The Court further explained that Pineda involved face-to-face transactions where there was “no legitimate need” to obtain PII from credit card holders and the PII was therefore “unnecessary to the credit card transaction.” 13 In contrast, the “unique fraud concerns” present in online transactions and the absence of any evidence that the Legislature intended to cover online transactions or considered the fraud concerns raised in the context of online transactions led the Court to conclude that the Act does not apply to online transactions.

The Microsoft order comes about four months after an order issued by the San Francisco Superior Court that dismissed a similar lawsuit against Craigslist. 14 The Craigslist court found that the Act “on its face does not apply to online transactions” and that the “applicable case law, legislative intent and public policy indicate that such transactions are not, and should not be encompassed by [the Act].”

Although the Craigslist, Microsoft, and Redbox decisions are important wins for online and “self-service kiosk” businesses because they conclude in no uncertain terms that such transactions are outside the scope of the Act, not all courts have been willing to dismiss Song-Beverly Credit Card Act claims against online retailers at the pleading stage. At least one California state court allowed a case against Ticketmaster and other online businesses to proceed, stating that the Court

6 Order at 3.
7 Id.
8 Id. at 5.
9 Id.
10 Id.
11 Id.
12 Id. at 7.
13 Id.
was “not prepared, at the pleading stage, to read the Act as completely exempting online credit transactions from its reach.”15 Thus, while a trend is emerging limiting the reach of the Act to brick-and-mortar transactions, there is still conflict among the trial courts, and an appellate court has yet to consider the issue.

UPDATE: Although the Microsoft order was vacated on February 28, 2012 (after the Court voluntarily recused itself due to a conflict of interest), the Redbox order remains in full force and effect.

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on The American Lawyer’s A-List for seven straight years, and Fortune named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Morrison & Foerster has a world-class privacy and data security practice that is cross-disciplinary and spans our global offices. With more than 60 lawyers actively counseling, litigating, and representing clients before regulators around the world on privacy and security of information issues, we have been recognized by Chambers and Legal 500 as having one of the best domestic and global practices in this area.

For more information about our people and services and the resources we offer such as our free online Privacy Library, please visit: http://www.mofo.com/privacy--data-security-services/ and "like" us on Facebook at http://www.facebook.com/MoFoPrivacy.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.